BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of PACIFIC CARRIAGE LIMITED For a Declaratory Ruling.	)	DOCKET NO. 04-0172

DECISION AND ORDER NO. 21405

Filed Oct. 7, 2004

At 1 o'clock P .M.

Karen Higashi

Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

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DECISION AND ORDER

I.

Background

PACIFIC CARRIAGE LIMITED, ("Petitioner") seeks a declaratory ruling that its proposed transaction involving the provision of certain limited services on Petitioner's international submarine fiber-optic cable system is not subject to regulation by the commission and does not require certification under chapter 269, Hawaii Revised Statutes ("HRS") and the commission's regulations promulgated thereunder.[1] Petitioner makes its request for declaratory ruling in accordance with Hawaii Administrative Rules ("HAR") chapter 6-61, subchapter 16 and HRS § 91-8.

Petitioner served copies of its Petition on the Department of Commerce and Consumer Affairs, Division of Consumer Advocacy ("Consumer Advocate").

On August 4, 2004, the Consumer Advocate filed the Division of Consumer Advocacy's Statement of Position ("SOP"),

[1]Petition and Memorandum for Declaratory Ruling ("Petition"), filed on July 9, 2004.

concluding that Petitioner should be considered a public utility under the arrangements set forth in its Petition, and recommending that Petitioner be required to obtain a certificate of authority to sell its cable capacity, with "appropriate and reasonable waivers and exemptions from existing regulatory requirements set forth by the applicable statutes and rules, including, but not limited to HRS [chapter] 269, and HAR [chapter] 6-80, to effect a level of reduced regulation on its operations."[2]

On August 9, 2004, the commission issued Order No. 21230, allowing Petitioner an opportunity to respond to the Consumer Advocate's SOP by August 23, 2004, and extended the date by which the commission must issue a declaratory ruling to within forty-five (45) days of: (a) the filing of Petitioner's response, or (b) the lapse of the August 23, 2004 deadline, whichever is earlier.

The Petitioner filed its response to the Consumer Advocate's SOP on August 23, 2004,[3] to which the Consumer Advocate replied on August 27, 2004.[4]

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[2]SOP at 14.

[3]Response of Petitioner Pacific Carriage Limited to the Division of Consumer Advocacy's Statement of Position.

[4]Division of Consumer Advocacy's Response to Petitioner Pacific Carriage Limited's Response to the Division of Consumer Advocacy's Statement of Position.

II.

Background

A.

Petitioner and its Affiliates

Petitioner is a Bermuda corporation that is authorized to transact business in the State of Hawaii ("State"). Petitioner is a wholly owned subsidiary of Pacific Carriage Holdings Limited ("PCHL"), also a Bermuda corporation. PCHL is jointly owned by TCNZ Bermuda Limited, a limited liability company organized under the laws of Bermuda ("TCNZ Bermuda"), Optus Networks Pty Limited, an Australian corporation ("Optus Networks"), and MFS Cable Co. U.S., Inc., a Delaware corporation ("MFS Cable").

TCNZ Bermuda is a wholly owned subsidiary of Telecom Southern Cross Limited, a New Zealand corporation ("TSCL"), which in turn is wholly owned by Telecom Corporation of New Zealand Limited ("TNZ"), a New Zealand corporation. TNZ is the parent company of Telecom New Zealand Limited, a New Zealand corporation ("TNZL"). TNZL acts as the principal operating subsidiary for TNZ and provides local, long distance, wireless, and international facilities-based services in New Zealand.

Optus Networks is an Australian corporation owned by SingTel Optus Pty Limited, which provides local, long distance, wireless, and international facilities-based services in Australia.

MFS Cable is a Delaware corporation that is ultimately owned by MCI, Inc., formerly WorldCom, Inc., a public corporation organized in 1983 under the laws of the State of Georgia ("MCI").

B.

Facilities and Operations

TNZ, Optus, and MCI, through directly and indirectly owned subsidiaries, as set forth above, formed, among other entities, Petitioner and Southern Cross Cables Limited ("SCCL"), a Bermuda corporation, to finance, construct, operate, and maintain the Southern Cross Cable Network, a 30,500 kilometer submarine cable loop system connecting Australia, New Zealand, Fiji, Hawaii, and points on the West Coast of the United States ("U.S.").

The Southern Cross Cable Network, including Petitioner's facilities and equipment, provides interstate and international telecommunications capacity. The collective owners of the Southern Cross Cable Network (referred to as "Southern Cross Cable Network Entities") who include, but are not limited to, Petitioner and SCCL, executed individual contracts with various customers, including, for example, TNZL, Optus Networks, and MCI, to determine usage of the cable network capacity.

Through a separate Landing Party Agreement dated September 28, 1998, between Petitioner and GTE Hawaiian Tel International Incorporated, a Delaware corporation (whose interests have been succeeded by Verizon Hawaii International Incorporated, a Delaware corporation)("Landing Party") the Landing Party provides Petitioner with telecommunications landing services in the State, including, without limitation, the operation, maintenance and management of Petitioner's Kahe Point cable landing station ("Kahe Landing Station"), the Spencer Beach cable landing station

owned by Verizon Hawaii Inc. ("Spencer Landing Station"), and Petitioner's associated fiber-optic cables.

Petitioner asserts that while it, along with the other Southern Cross Cable Network Entities, owns the Southern Cross Cable Network and cable terminal equipment and makes capacity available on such facilities to its customers, it does not provide any telecommunications services. It further contends that its individual customers must make their own arrangements by either using their own facilities or with authorized telecommunications service providers or others to access Petitioner's cable terminal equipment to pick up or deliver traffic.

Petitioner states that the Federal Communications Commission ("FCC") approved the modification of a cable landing license, then held by MFS International, Inc., to allow Petitioner to hold the license for the cable landing stations and related terrestrial and submarine segments of the Southern Cross Cable Network in Hawaii, including the terrestrial and submarine cable landing segment extending between the cable stations on the islands of Oahu and Hawaii and the submarine portions of the Southern Cross Cable Network extending to the twelve (12) nautical mile limit of U.S. territorial waters to the beach joints at the Hawaii landing sites.

Petitioner also advises that the FCC issued to it an international Section 214 certificate, pursuant to 47 C.F.R. § 63.18.

A portion of Petitioner's facilities used in connection with the Southern Cross Cable Network includes the Kahe Point

Landing Station on the island of Oahu, the Spencer Beach Landing Station on the island of Hawaii, and the submarine fiber-optic cable connecting the two Hawaii landing stations ("wet-link").

The Southern Cross Cable Network roughly resembles a "figure 8" with the center of the "figure 8" helix joining Oahu and the island of Hawaii. Petitioner advises that the wet-link between the islands of Oahu and Hawaii was designed, and is used, to complete the Northern Ring and the Southern Ring of the Southern Cross Cable Network and allows for backup traffic paths on the rings. In particular, Petitioner asserts that the wet-link was not specifically designed for the purpose of providing interisland connectivity. Instead, the Petitioner suggests it was designed to cross-connect the two separate strands of the main undersea cables at their optimum mid-points to complete the Northern Ring and the Southern Ring. Petitioner contends that this cross-connection point of the "figure 8" provides for redundant and uninterrupted flow of international and interstate traffic, seamlessly, over and between the two main portions of the international cables linking Australia, New Zealand, and Fiji, through Hawaii, to points on the U.S. Mainland. The wet-link further provides for restoration in the event of certain combinations of multiple segment failures.

Petitioner states that it sells capacity on three traffic rings. For example, Hawaii-U.S. Mainland traffic would be carried on the Northern Ring, while Fiji-New Zealand traffic would be carried on the Southern Ring, and Australia-U.S. Mainland traffic would be carried on the North-South Ring.

Petitioner states that it has not sold, nor does it currently provide for sale, a traffic path that is solely interisland. Petitioner currently sells capacity to or from Hawaii on the Northern Ring and Southern Ring to a variety of carriers, and all customers accessing the Southern Cross Cable Network rings in Hawaii do so at Kahe Point Landing Station and not at the Spencer Beach Landing Station. None of Petitioner's customers has to date accessed the Petitioner's cable terminal equipment at the Spencer Beach Landing Station, and none have terminated or originated any calls on the island of Hawaii to date using Petitioner's cable facilities. All Oahu traffic on the Petitioner's facilities originates from or terminates on the U.S. Mainland or an international point.

C.

Proposed Activity

Petitioner is considering the possible sale of an indefeasible right of use (also known as "IRU"), on a long-term basis, of a Synchronous Transport Module - level four (also known as "STM-4") solely between the islands of Oahu and Hawaii. The arrangement contemplates that capacity would be provided only between Petitioner's Kahe Point Landing Station and Spencer Beach Landing Station. The customer would be required to make its own arrangements to access, pick up, and deliver traffic at such cable landing stations.

Petitioner explains that it has been approached by telecommunications carriers authorized by the commission to provide

telecommunications services in the State (collectively, "Hawaii Telecommunications Carriers") to inquire whether Petitioner would consider selling capacity between the islands of Oahu and Hawaii on a wholesale basis to them.

D.

Request for Declaratory Ruling

Petitioner advises that it is considering whether to make its unused capacity between the islands of Oahu and Hawaii available to the Hawaii Telecommunications Carriers. Petitioner seeks to determine whether the selling of capacity to render intrastate services for their customers under their respective intrastate authority and the provisions of their respective intrastate tariffs would subject Petitioner to regulation by the commission.

Petitioner believes that it should not be subject to regulation under chapter 269, HRS, if it were to sell capacity over its wet-link to Hawaii Telecommunications Carriers. It advises that if it is unable to engage in such activities without subjecting itself to chapter 269, HRS, it will elect not to make such capacity available for such uses by the Hawaii Telecommunications Carriers.

III.

Discussion

A.

Public Utility Definitions

A "public utility" is defined in HRS § 269-1, in relevant part, as:

> ...every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for ... the conveyance or transmission of telecommunications messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air within the State, or between points within the State, ... provided that the term: ... (2) Shall include telecommunications carrier or telecommunications common carrier; ...

Telecommunications carriers or telecommunications common carriers are further defined by HRS § 269-1 as:

> ...any person that owns, operates, manages, or controls any facility used to furnish telecommunications services for profit to the public, or to classes of users as to be effectively available to the public, engaged in the provision of services, such as voice, data, image, graphics, and video services, that make use of all of part of their transmissions facilities, switches, broadcast equipment, signaling, or control devices.

The terms "Telecommunications service" or "telecommunications" are defined by the same section as:

> ... the offering of transmission between or among points specified by a user, of information of the user's choosing, including voice, data, image, graphics, and video without change in the form or content of the information, as sent and received, by means of electromagnetic transmission, or other similarly capable means of transmission, with or without benefit of any closed transmission medium,

> and does not include cable service as defined in [HRS] section 440G-3.

Petitioner contends that its proposed plan to offer wet-link capacity to certain Hawaii Telecommunications Carriers would not render it a public utility, as defined by HRS § 269-1. It states that it "would lack the necessary elements of public use as it would not be holding itself out, either expressly or impliedly, to engage in the business of supplying its capacity to the public in Hawaii, as a class, or to any limited portion of the public."[5] Petitioner argues that its customers would be limited to telecommunications carriers that have been certificated or otherwise clearly authorized by the commission to provide telecommunications services in Hawaii.

Petitioner further contends that its proposed sale of its capacity would not involve telecommunications services, as defined in section 269-1, HRS, since it would not include an "offering of transmission between or among points specified by a user, of information of the user's choosing, including voice, data, image, graphics, and video without change in the form or content of the information..." (emphasis added). Petitioner asserts:

> ...the ultimate end users of Petitioner's facilities will not be transmitting information of that user's choosing over Petitioner's facilities, nor will such a user be specifying the points between or among which such information is to be transmitted. Instead, Petitioner's customers will be authorized/certificated [Hawaii] Telecommunications Carriers whose own customers choose the information that is to be transmitted, between or among points specified by them to the [Hawaii] Telecommunications Carriers. Petition at 13.

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[5]Petition at 12.

Petitioner states that it will not be a telecommunications carrier with respect to the proposed activity. As support for its contention, it points to the decisions made by the FCC and federal courts that distinguish between telecommunications common carriers and telecommunications non-common carriers, since the FCC and the courts have subjected only common carriers to the regulations set forth at 47 U.S.C. Title II (1976). In particular, it relies upon the two-part test for evaluating whether an operation should be classified as common carrier asserted by the Court of Appeals for the D.C. Circuit in National Ass'n of Regulatory Utility Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir. 1976), 425 U.S. 992 (1976)("NARUC 1"): (1) whether the public interest requires common carrier operation of a proposed facility; and (2) whether a carrier will make capacity available to the public indifferently. Petitioner notes that the FCC, when applying the test set forth in NARUC 1, determined that an entity is offering a service on a non-carrier basis where one of the following factors was present:

1. The entity offered the service through a long-term lease or sale;
2. The entity provided a large amount of capacity;
3. The entity provided the service through an individually negotiated contractual arrangement; and
4. The entity provided service to a very small, hand-picked customer base.

Petitioner asserts that application of the two-part test and consideration of the FCC's non-carrier factors render it a non-

carrier, and ultimately, not within the definition of a telecommunications carrier. First, it argues that numerous interexchange carriers already provide communications service between the islands of Oahu and Hawaii. Second, it suggests that it will be selling its bulk cable service only through individual negotiations with potential customers in order to meet the customer's particular technological and marketing requirements. Thus, it contends that it will make individualized decisions as to whether and on what terms to serve, and will not undertake to carry for all people indifferently. Finally, it states that it will be providing capacity to these customers in large blocks, and will sell this capacity to a very small and hand-picked customer base, on a long-term basis.

In its SOP, the Consumer Advocate asserts that while the Petitioner would not be providing telecommunications services within the State, it would meet the definition of a "telecommunications carrier/telecommunications common carrier," since it will own a "facility used to furnish telecommunications services" and would provide such services to the Hawaii Telecommunications Carriers, another class of customers. The Consumer Advocate suggests that "given that facilities-based providers are required to provide competitors with access to their facilities in order to facilitate competition in the telecommunications market, the [c]omission is required to exercise regulatory oversight over the facilities-based parties to ensure

that non-discriminatory access is made available to all competitors."[6]

The Hawaii Supreme Court in In re Wind Power Pacific Investors - III, 67 Haw. 342, 345, 686 P.2d 831, 834 (1984) stated the following test to determine whether a person is a public utility:

> [T]he owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

We agree that in this instance, the Petitioner "would not be holding itself out, either expressly or impliedly, to engage in the business of supplying its capacity to the public in [the State], as a class, or to any limited portion of the public. Instead, Petitioner would only be making its capacity available to the small number of Hawaii Telecommunications Carriers on a separately negotiated contract basis."[7] The commission finds it useful to examine the four criteria established by the FCC in NARUC 1, and is persuaded that the Petitioner in this instance will meet not only one but all of the four factors articulated in that case.

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[6]Consumer Advocate's SOP at 7.

[7]Petition at 12.

We are mindful that the telecommunications market is unique and there may be opportunity for carriers to attempt to circumvent regulation by the commission as the Consumer Advocate suggested in its SOP. Nevertheless, we believe that: (1) the Petitioner's services, as described in the Petition, will not be offered for "public use" or to the public within the meaning of HRS § 269-1; (2) it is in the public interest to make more telecommunications capacity available to telecommunications customers; and (3) the Consumer Advocate's concerns that the Petitioner's services may rise to the level of providing services for public use or to the public and that the Petitioner may act in a discriminatory manner against certain carriers, resulting in harm to the competitive telecommunications market are premature, and may be addressed when and if either situation arises.

Accordingly, the commission finds that the proposed activity, as described herein, would not render Petitioner a public utility, as defined in HRS § 269-1. We conclude that the Petitioner should not be required to file an application requesting operating authority prior to the sale of its capacity, as described herein, provided that the facts presented, including, but not limited to the fact that the Petitioner meets at least one of the four factors articulated in the NARUC 1 case, and the representations made in its Petition remain true and accurate.

B.

Mixed-Use Facilities Rule

Petitioner suggests an alternate reason for asserting that it should not be subject to the regulation by the commission under chapter 269, HRS - it is subject to federal jurisdiction under the FCC's mixed-use facilities rule.

Petitioner states that the FCC asserted exclusive jurisdiction over mixed-use facilities involving intrastate and interstate traffic where it is not possible to separate or apportion the usage between the intrastate and interstate portions but where the interstate traffic exceeds ten (10) per cent of the total traffic over such facilities.[8]

Petitioner advises that it plans to obtain written certification from the Hawaii Telecommunications Carriers that choose to contract for capacity over the wet-link that it is not possible to separate or apportion the usage of their wet-link traffic between intrastate and interstate services, and that at least ten (10) per cent of any traffic that carried over the wet-link will be interstate in nature.

In its SOP, the Consumer Advocate notes that the rulings cited to by the Petitioner in its Petition relating to the 10 per cent rule were specifically limited to special access lines

[8]See In re GTE Tel. Operating Cos., GTOC Tariff No. 1, GTOC Transmittal 1148, CC Docket 98-79, 13 FCC Rcd 22466 (1998); In re Matter of Alascom, Inc., Petition for Declaratory Ruling Regarding Intrastate Private Lines, 10 FCC Rcd 12126 (1995); and MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 4 FCC Rcd 5660 (1989).

and a special access data service.[9] It further states that the Petitioner "has not provided evidence to show that the [10 per cent rule] has universal application to all plant and services."[10]

The commission finds that there is insufficient evidence on the record to render a declaration on this matter at this time. In light of our earlier conclusion that the Petitioner is not subject to commission regulation for the proposed activity described in its Petition and our finding that there is insufficient evidence on the record to render a declaration on this matter at this time, we find good cause to decline to issue a declaratory ruling on Petitioner's alternate request that the commission conclude that the proposed activity is subject to federal jurisdiction under the FCC's mixed-use facilities rule.

IV.

Declaratory Ruling and Order

THE COMMISSION DECLARES that, under the facts and circumstances of this case, Petitioner is not a public utility, as defined under HRS § 269-1, as long as the facts presented and representations made to the commission in this docket remain true and accurate.

THE COMMISSION ORDERS that this docket is closed.

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[9]Consumer Advocate's SOP at 8.

[10]Id.

DONE at Honolulu, Hawaii OCT 7 2004.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By _____
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By _____
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

Catherine P. Awakuni
Commission Counsel

04-0172.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21405 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: OCT 7 2004